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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/798,164	03/10/2004	Klaus Kwetkat	Muller-25-1	5119

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08/22/2007

EXAMINER

DELCOTTO, GREGORY R

ART UNIT	PAPER NUMBER
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1751

MAIL DATE	DELIVERY MODE
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08/22/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/798,164	Applicant(s) KWETKAT ET AL.	
	Examiner Gregory R. Del Cotto	Art Unit 1751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on RCE filed 5/29/07.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 2-4, 6, 7, 9-13, 17, 19-22, 24-27, 32-42, 51 and 52 is/are pending in the application.
- 4a) Of the above claim(s) 19-22 and 24-27 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 52 is/are allowed.
- 6) ☒ Claim(s) 2-4, 6, 7, 9-13, 17, 32-42 and 51 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☒ Certified copies of the priority documents have been received in Application No. 09/831,796.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. Claims 2-4, 6, 7, 9-13, 17, 19-22, 24-27, 32-42, 51, and 52 are pending. Claims 1, 5, 8, 14-16, 18, 22, 28-31, and 43-50 have been canceled. Applicant's amendments and arguments filed 5/29/07 have been entered.

Claims 19-22 and 24-27 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 12/27/05. Note that, instant claim 23 has been improperly labeled as "withdrawn" – this claim is not withdrawn but under examination.

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 5/29/07 has been entered.

Objections/Rejections Withdrawn

The following objections/rejections as set forth in the Office action mailed 11/29/06 have been withdrawn:

The rejection of claim 23 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention has been withdrawn.

The rejection of claims 3, 4, 6, 7, 9, 11-13, 17, 23, 32-35, 37-42, and 51 under 35 U.S.C. 102(a) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over DE 19855080 has been withdrawn due to the filing of a English language translation of the foreign priority document.

The rejection of claims 2, 10, and 36 under 35 U.S.C. 103(a) as being unpatentable over DE 19855080 has been withdrawn due to the filing of a English language translation of the foreign priority document.

Priority

Acknowledgment is made of applicant's claim for foreign priority under 35 U.S.C. 119(a)-(d). The certified copy has been filed in parent Application No. 09/831,796, filed on 8/13/01.

Claim Objections

Claims 11-13 and 39-41 are objected to because of the following informalities:

With respect to claim 11, it is suggest that Applicant delete the parentheses following "method" in lines 3 and 4. Note that, claims 12, 13, and 39-41 have also be objected to due to their dependency on claim 11.

Appropriate correction is required.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 2-4, 6, 7, 9-13, 17, 32-42, and 51 are rejected under 35 U.S.C. 103(a) as unpatentable over DE 19622612. Note that, a translation of this document has been received.

'612 teaches an active care ingredient in skin care and hair treatment agents is a mixture of a diacylalkenyldiaminodicarboxylic acid and an oil, fat, or wax. Note that, '080 teaches the same surfactants as recited by formula B.III of the instant claims. Additionally, the compositions may contain fatty acids having from 12 to 18 carbon atoms, fatty alcohols containing an alkyl radical having from 1 to 8 carbon atoms, etc. which assist in acylation. The fatty alcohols can be used in amounts from 20 to 50% by volume. See page 4, lines 20-25. The compositions may contain surfactants such as glycerol mono- and diesters and sorbitan mono-and diesters of saturated and unsaturated fatty acids having from 6 to 22 carbon atoms and ethylene oxide addition

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products thereof, etc. See page 7, lines 1-30. Additionally, superfatting agents may be used including lecithin derivatives, etc. See page 22, lines 1-40.

'612 does not teach, with sufficient specificity, a surfactant composition containing a Gemini surfactant, two or more co-amphiphiles, and the other requisite components of the composition in the specific amounts as recited by the instant claims.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to formulate a surfactant composition containing a Gemini surfactant, two or more co-amphiphiles, and the other requisite components of the composition in the specific amounts as recited by the instant claims, with a reasonable expectation of success and similar results with respect to other disclosed components, because the broad teachings of '612 suggest a surfactant composition containing a Gemini surfactant, two or more co-amphiphiles, and the other requisite components of the composition in the specific amounts as recited by the instant claims.

Allowable Subject Matter

Claim 52 is allowed.

None of the references of record, alone or in combination, teach or suggest a surfactant composition containing the specific Gemini surfactant as recited by formula B(III), the specific co-amphiphiles, and the other requisite components of the composition in the specific amounts as recited by the instant claims.

Response to Arguments

With respect to '612, Applicant states that while it is recognized that the '612 reference discloses a gemini surfactant which overlaps with the gemini surfactant set

forth in formula B.III. as recited by the instant claims, the '612 reference contains no teaching or motivation to use the two specific co-amphiphiles as also recited by the instant claims. Further, Applicant states that the obviousness rejection is based on impermissible hindsight and that the composition as recited by the instant claims, and more specifically claim 9, could not be arrived at without using Applicant's disclosure as a recipe book. In response, note that, the Examiner maintains that the teachings of '612 are sufficient to suggest the claimed invention and that one of ordinary skill in the art would be motivated to formulate the composition as recited by the instant claims from the teachings of '612. The teachings of a reference are not limited to the preferred embodiments and even though '612 teaches numerous additional ingredients that may be used in combination with the Gemini surfactant, the Examiner maintains that one of ordinary skill in the art would be motivated, from the teachings of '612, to use mixtures of these additional components, including those which are the amphiphiles as recited by instant claims, in combination with the Gemini surfactant. Note that, with respect to instant claim 9, '612 teaches the use of triglycerides of C6-C10 fatty acids (See page 18, lines 1-10) and the use of C16-C22 fatty alcohols (See page 22, lines 20-25) which is the same combination as recited by instant claim 9. Thus, the Examiner maintains that '612 is sufficient to render to the invention as recited by the instant claims obvious under 35 USC 103(a).

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon

hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Conclusion

2. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Remaining references cited but not relied upon are considered to be cumulative to or less pertinent than those relied upon or discussed above.

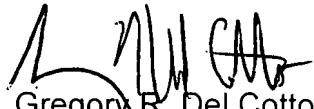
Applicant is reminded that any evidence to be presented in accordance with 37 CFR 1.131 or 1.132 should be submitted before final rejection in order to be considered timely.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gregory R. Del Cotto whose telephone number is (571) 272-1312. The examiner can normally be reached on Mon. thru Fri. from 8:30 AM to 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Douglas McGinty can be reached on (571) 272-1029. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Gregory R. Del Cotto
Primary Examiner
Art Unit 1751

GRD
August 20, 2007